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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below was correct in finding that, as a matter of law, it was powerless to consider a petition for a writ of mandamus to review the trial court's certification of (or refusal to decertify) an alleged class action.

2. Whether refusal of the court below to consider the petition was an abuse of discretion when this alleged diversity class action was scheduled to be tried shortly on "common issues" arising under conflicting legal standards (involving the laws of some 50 jurisdictions) pursuant to a trial plan which, *e.g.*, calls for punitive damages being assessed against defendants before any determination of liability or compensatory damages with respect to any defendant.

PARTIES BELOW

In Case No. 90-1217, the petitioners, in addition to W.R. Grace & Co., were The Celotex Corporation, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Inc., Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard Corp., GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., Kaiser Cement Corp., Pfizer Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons and U.S. Mineral. Respondents were Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools and a Conditionally Certified Class. The Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, was a nominal respondent. Defendant National Gypsum Company submitted papers characterizing itself as a respondent in No. 1217.

Consolidated with Case No. 90-1217 was Case No. 90-1219, in which, the petitioner was Eagle-Picher Industries, Inc., which has since gone into bankruptcy.

Rule 29.1 Statement

Pursuant to Rule 29.1, the Court is advised that W.R. Grace & Co. (renamed W.R. Grace & Co.-Conn. since the pleadings herein) is now a wholly owned subsidiary of W.R. Grace & Co., a publicly traded company with no parent company. Other than wholly-owned subsidiaries, subsidiaries of petitioner or its parent (or their subsidiaries) are Del Taco Corporation, Del Taco Restaurants, Inc., Grace Energy Corporation, Grace Drilling Company and La Posta Recycling Center Inc.

The Rule 29.1 statements regarding other petitioners appear at pages 1a and 2a of the Appendix.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED	3
STATEMENT OF THE CASE	3
Original Class Certification	3
Decertification Proceedings in the District Court	5
Proceedings in the Court Below	6
REASONS FOR GRANTING THE WRIT	9
ARGUMENT	10
I. THE DECISION BELOW CREATES A CONFLICT WITH AT LEAST FIVE OTHER CIRCUITS	10
II. THE RESULT BELOW ARBITRARILY DEPRIVES LITIGANTS OF RELIEF FROM ARBITRARY ACTIONS OF TRIAL COURTS EVEN THOUGH THEY VIOLATE CONSTITUTIONAL RIGHTS	15

PAGE

CONCLUSION 19

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:	PAGE
Allegheny International, Inc. v. *Allegheny Ludlum Steel Corp.*, 920 F.2d 1127 (3d Cir. 1990)	18
Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980)	11
In re Allied-Signal, Inc., 915 F.2d 190 (6th Cir. 1990)	13
Anschul v. *Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976)	15
Arthur Young & Co. v. *United States District Court*, 549 F.2d 686 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)	15
Bauman v. *United States District Court*, 557 F.2d 650 (9th Cir. 1977)	12-13, 13n
In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984)	12
In re Cessna Aircraft Distributorship Antitrust Litigation, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975)	14
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	16n
DeMasi v. *Weiss*, 669 F.2d 114 (3d Cir. 1982)	8, 9
In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987)	13
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	17
In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990)	14

PAGE

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494 (1931) 8, 18

General Motors Corp. v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) 14, 15

Gold Strike Stamp Co. v. *Christensen*, 436 F.2d 791 (10th Cir. 1970) 15n

Green v. *Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976) 14-15

Katz v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) 12

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) 17

Lamphere v. *Brown University*, 553 F.2d 714 (1st Cir. 1977) 15

Lusardi v. *Lechner*, 855 F.2d 1062 (3d Cir. 1988) 11-12

Mallard v. *United States District Court*, 490 U.S. 296 (1989) 11

McDonnell Douglas Corp. v. *United States District Court*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) 14

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 1, 5, 6, 8, 9, 17-18

Schmidt v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) 14

Simone v. *Golden Nugget Hotel and Casino*, 844 F.2d 1031 (3d Cir. 1988) 18n

Sperry Rand Corp. v. *Larson*, 554 F.2d 868 (8th Cir. 1977) 14

PAGE

In re Temple, 851 F.2d 1269 (11th Cir. 1988)..... 13

3250 Wilshire Boulevard Building v. *W.R. Grace & Co.*, No. 87-6048-WMB, slip op. (C.D. Cal. July 24, 1989), *reprinted in* 1989 Mealey's Asbestos Prop. Actions Litig. Rep. D-1 (Aug. 4, 1989)..... 5n

Vizzini v. *Ford Motor Co.*, 569 F.2d 754 (3d Cir. 1977) 18n

Constitutional Provision

U.S. Const. Amend. VII 3, 8, 18

Rules

Federal Rules of Appellate Procedure, Rule 21..... 2-3

Federal Rules of Civil Procedure

Rule 23 .....*passim*

Rule 23(b)(1)(B)..... 1, 4

Rule 23(b)(3)..... 1, 4

Rule 49(a) 2

Statutes

Bankruptcy Code

11 U.S.C. § 362 (1988) 8n

All Writs Act

28 U.S.C. § 1651 (1988) 2, 3, 10, 14

Judicial Code

28 U.S.C. § 1254(1) (1988) 3

28 U.S.C. § 1291 (1988) 16, 16n

28 U.S.C. § 1292(b) (1988) 6, 9, 16, 16n

28 U.S.C. § 1332 (1988) 2

PAGE

Rules of Decision Act
28 U.S.C. § 1652 (1988) 3, 17

Other Authorities

Manual for Complex Litigation, Second (1985)..... 16

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *In re School Asbestos Litigation*, No. 90-1217, 921 F.2d 1338 (3d Cir. 1990), filed on December 13, 1990, and amended on January 7, 1991.

OPINIONS BELOW

The decision below, *In re School Asbestos Litigation*, No. 90-1217, 921 F.2d 1338 (3d Cir. 1990), refused to consider, on the ground that the Court lacked the power to do so, defendants' petition for a writ of mandamus to review the trial court's refusal to decertify this alleged diversity class action. (District Court Pretrial Order No. 203, dated January 11, 1990, unreported but reprinted in the Appendix hereto, 3a-9a.)

The District Court originally certified this case in 1984 as a Fed. R. Civ. P. 23(b)(3) "opt-out" class for compensatory damages and a Fed. R. Civ. P. 23(b)(1)(B) mandatory class for punitive damages. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984) and 107 F.R.D. 215 (E.D. Pa. 1985). In response to a certified question, the Third Circuit at that time affirmed the Rule 23(b)(3) certification and reversed the Rule 23(b)(1)(B) certification. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). Thereafter, the District Court entered the following Pretrial Orders which are unreported and are reprinted in the Appendix hereto:

(a) Order No. 167, dated January 27, 1989, recognizing that under the governing choice of law rules and *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), the substantive laws of each class member's state or

other jurisdiction (more than 50 jurisdictions in all) governs its claim in this case (10a-15a).

(b) Order No. 169, dated January 27, 1989, requiring the parties to file a Joint Pretrial Order on or before May 1, 1990 and requiring that this action be placed in the trial pool of June 1, 1990 (16a).

(c) Order No. 203, dated January 11, 1990, denying defendants' motion for decertification of the class (17a-20a).

(d) Order No. 235, dated May 17, 1990, identifying seven issues to be tried in Phase I of the trial, and requiring the parties to propose factual interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and to advise the court of the jurisdictions to which they pertain (21a-22a). The District Court has since advised the parties that the Phase I trial will commence this summer (1991).

JURISDICTION

Plaintiffs allege that the court has federal subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332 (1988), because many—but, as the complaint concedes, not all—of the class members have claims in excess of $10,000.[1]

In the proceeding below, the jurisdiction of the United States Court of Appeals for the Third Circuit was invoked under 28 U.S.C. § 1651 (1988) and Rule 21 of the Federal

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1 Various petitioners have joined in a petition for a writ of *certiorari* filed herewith seeking this Court's review of two related decisions, *In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990), and *In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990). That petition, and Judge Cowen's thoughtful dissents below, demonstrate that diversity jurisdiction is lacking here because (1) many or most plaintiffs cannot allege damages sufficient to satisfy the applicable $10,000 minimum jurisdictional amount and (2) a number of class members are citizens of the same state as a defendant.

Rules of Appellate Procedure. Here, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). The Petition is being timely filed within 90 days of the Third Circuit's December 13, 1990 decision, amended January 7, 1991.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The text of the Seventh Amendment to the United States Constitution, the All Writs Act, 28 U.S.C. § 1651, the Rules of Decision Act, 28 U.S.C. § 1652 (1988), and Rule 23 of the Federal Rules of Civil Procedure are set forth in the Appendix at 23a, 24a, 25a and 26a-28a, respectively.

STATEMENT OF THE CASE

Original Class Certification

These three alleged class actions (now consolidated) were filed in 1983 and 1984 in the United States District Court for the Eastern District of Pennsylvania on behalf of a putative nationwide class of all public and private elementary and secondary schools.[2] The complaints allege products liability property damage claims against approximately fifty defendants and seek to recover potentially billions of dollars in damages allegedly resulting from the installation in the class members' buildings (over a period of almost one hundred years) of hundreds of different asbestos-containing products mined, milled, manufactured, sold or installed by the defendants.

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2 *School District of Lancaster, et al.* v. *Lake Asbestos of Quebec, et al.*, No. 83-0268 (E.D. Pa.) (filed January 17, 1983 by three Pennsylvania school districts (Lancaster, Manheim Township and Lampeter-Strasburg)); *Barnwell School District* v. *U.S. Gypsum Co., et al.*, No. 83-1395 (E.D. Pa.) (filed March 23, 1983 by the Barnwell School District No. 45 of Barnwell, South Carolina); *Board of Education of the Memphis City Schools* v. *U.S. Gypsum, et al.*, No. 84-2312 (E.D. Pa.) (filed May 11, 1984 by the school districts of Memphis, Tennessee and Napa Valley, California).

In 1984, the District Court (James McGirr Kelly, J.) certified a nationwide opt-out class under Fed. R. Civ. P. 23(b)(3) of all public and private elementary and secondary schools to pursue compensatory damages based on the alleged presence of defendants' asbestos containing products in their various school buildings.[3] At the same time, Judge Kelly also certified a mandatory class under Fed. R. Civ. P. 23(b)(1)(B) to seek punitive damages. As noted above, the Third Circuit vacated the mandatory class certification but affirmed certification of the opt-out class "despite misgivings on manageability". *In re School Asbestos Litigation*, 789 F.2d 996, 998-99 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986). The court explained:

> "at the present stage, manageability is a serious concern
>
> . . . .
>
> • • •
>
> We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." *Id.* at 1011.

In September 1987, notice of the litigation was mailed to over 36,000 public and private school districts stating that, unless they excluded themselves from the litigation, they would be bound by any class judgment and would share in any compensatory damage recovery on behalf of the class. Over 1,500 school districts excluded themselves, many of them in the country's largest cities.

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3 Shortly after the Third Circuit denied the petition for mandamus, the trial court permitted the plaintiffs to redefine the class so as to include only those schools containing "friable asbestos-containing building materials" (Pretrial Order No. 273, filed Dec. 17, 1990). Their amended complaints all define "friable asbestos-containing material" as any asbestos-containing material that, "when dry, may be crumbled, pulverized, reduced to powder by hand pressure, or which is otherwise easily damaged." *See, e.g.*, Third Amended Complaint ¶ 6, *School District of Lancaster, et al.* v. *Lake Asbestos of Quebec, et al.*, No. 83-0268 (E.D. Pa.).

Decertification Proceedings in the District Court

When this class was certified in 1984, no asbestos-in-buildings case had been tried. Based on subsequent experiences in such cases, as well as subsequent scientific and legal developments, almost all of the defendants moved to decertify the class action in April of 1989. They showed, among other things, that substantial trial experience had demonstrated that every asbestos-in-buildings claim requires proof that airborne asbestos fibers have emanated at hazardous levels from the defendant's product in place in the plaintiff's building.[4] Since that issue, as well as the claimant's knowledge of any alleged danger of asbestos, are inherently individual to each plaintiff, asbestos-in-buildings claims are clearly unsuitable for class action treatment. They further showed that this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), requires the application of the varying and often conflicting laws of over 50 jurisdictions to the class members' claims, as the District Court recognized in its January 27, 1989 Pretrial Order No. 167, 10a-15a. These two factors alone dispel any illusion of commonality or manageability here, and show that the requirements of Rule 23 (26a-28a) cannot be met.

On January 11, 1990, the District Court, without a hearing, issued Pretrial Order No. 203 denying the motion for decertification, 17a-20a. Its three-page memorandum acknowledged the "individualized" nature of the products liability issues as well as the necessity of applying the substantive law of each state to claims arising there. Nevertheless, the District Court held, without explanation, that "common" issues which would not determine liability predominate, and that

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4 *E.g.*, *3250 Wilshire Boulevard Building* v. *W.R. Grace & Co.*, No. 87-6048-WMB, slip op. at p. 20 n.2 (C.D. Cal. July 24, 1989), *reprinted in* 1989 Mealey's Asbestos Prop. Actions Litig. Rep. D-1 (Aug. 4, 1989) ("In different contexts, courts may find that MK-3 [W.R. Grace's fireproofing product] may present a significant, or no risk of personal or property damage *depending on the condition of the material in a building*" (emphasis added)).

> "[t]he requirements of *Shutts* do not pose a problem in light of the 'strictest law' proposal of the plaintiffs and the possibility of creating subclasses in order to accommodate any necessary groupings of variances in products liability law among the states." (Pretrial Order No. 203, 19a)

These suggested "solutions" posited by the District Court are both inconsistent and impractical. The first would deprive class members not bound by the "strictest law" applicable to any issue of the more favorable laws of their own states (contrary to *Shutts*). The second would have the same class members in several different issue sub-classes, depending on the legal issue involved (since the states are aligned differently on the dozens of different legal issues here raised) without any class representative having qualified for any such sub-class. Perhaps in recognition of these difficulties, in the end the trial court abandoned both of these approaches in Pretrial Order No. 235 (22a).

The District Court's memorandum accompanying Pretrial Order No. 203 did not address any of the substantial reasons for decertification raised by defendants' motion such as the factual, legal and regulatory changes since 1984. Instead, it simply stated that none of the considerations urged by defendants were "novel or representative of changed circumstances" relevant to class certification (19a).

Proceedings in the Court Below

The motion to decertify was filed on April 24, 1989, and denied almost nine months later on January 11, 1990—four and a half months before the case was scheduled to be placed in the June 1990 trial pool. On January 29, 1990, the District Court denied a request for 28 U.S.C. § 1292(b) (1988) certification of the jurisdictional issue filed on November 22, 1989. Faced with the impending trial and the delay a § 1292(b) request would cause, twenty-seven defendants coordinated to file, on March 21, 1990, a single petition for a writ of man-

damus in the Third Circuit (Case No. 90-1217), seeking review of the refusal to decertify the nationwide class.

On May 17, 1990, while the petition was pending, the District Court issued a Phase I trial plan which adopted yet a third "solution" to the *Shutts* problem of conducting a jury trial under the laws of over fifty jurisdictions—*i.e.*, the court would ask the jury purely "factual interrogatories" which are to be submitted by the parties, along with a list of each jurisdiction to which they apply (Pretrial Order No. 235, 22a) and then the court would itself apply the varying state laws to the answers. Pretrial Order No. 235 (21a-22a) specified the issues to be tried in Phase I as:

> "A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.
>
> B. Defendants' knowledge of the health hazards of asbestos.
>
> C. Defendants' failure to properly warn or test.
>
> D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.
>
> E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.
>
> F. Punitive damages.
>
> E. Common defenses." (Pretrial Order 235, 21a)

Notably absent from these issues is any effort to determine which, if any, of the plaintiffs has any defendant's product in its buildings, or whether any defendant's product would give rise to liability. Thus, even after the proposed protracted multi-party trial on the above-listed issues, the District Court would still not know what defendants were properly before it, which defendants' products or class members' buildings are involved in the case, or who was bound by any Phase I decision on either side (since those plaintiffs who meet the jurisdictional amount would not have been identified).

In addition to so arguing to the Third Circuit, petitioners pointed out that it had become apparent that the District Court's proposed "solution" to the *Shutts* problem imperiled defendants' rights to a unitary jury trial under the Seventh Amendment and this Court's ruling in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931).

In its brief opinion filed on December 13, 1990, as amended on January 7, 1991,[5] the Third Circuit refused to consider the merits of the mandamus petitions. Instead, it held that its prior decision in *DeMasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), "precludes the use of mandamus to reverse the grant or denial of a class certification." 921 F.2d at 1341, 9a. The author of *DeMasi*, Judge Aldisert, summarized it during oral argument as saying that a certification issue "could only come up on 1292" (Tr. of Oral Argument, 29a). When counsel for W.R. Grace & Co. pointed out that *DeMasi* stated that § 1292(b) was the only proper route to review "at least in this case," Judge Aldisert replied, "[w]hen we said 'at least in this case,' we were talking about 1292(b). The point is if it is not 12—if it is not a final order under 1291, how can it come up on mandamus?" (Tr. of Oral Argument, 29a).

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5 In filing its initial opinion on December 13, 1990, the Third Circuit mistakenly assumed that the Celotex Corporation, which by that time had filed for bankruptcy, was the only petitioner in Case No. 90-1217; it therefore stayed No. 90-1217 under 11 U.S.C. § 362 (1988). In fact, that petition was also explicitly filed on behalf of twenty-six other petitioners. When that fact was called to its attention, the Court below amended its opinion on January 7, 1991, making clear that the petition in No. 90-1217 was denied with respect to all petitioners other than Celotex on the same ground as the initial denial of similar relief to defendant Eagle Picher Industries, Inc. in No. 90-1219, 7a and 9a. However, it failed to correct its obviously mistaken reference in the text to "the petitioners, who are two of the fifty defendants in the district court" (8a).

REASONS FOR GRANTING THE WRIT

The trial court has certified a nationwide class of all public and private school districts to pursue inherently individual diversity claims involving the conflicting laws of some 50 jurisdictions. Its trial plan to solve the resulting *Shutts* problem is to submit fractionated factual issues to the jury without any legal instruction or any advice as to the legal consequences of the jury's verdicts. Moreover, the trial plan would have the jury make punitive damage and other findings before hearing evidence that could lead to any finding of liability or compensatory damages.

This proposed class action trial, scheduled for this coming summer, threatens defendants with imminent and irreparable deprivation of basic constitutional rights. Yet the court below held that the trial court's class action rulings, no matter how arbitrary, could *never* be challenged by a petition for a writ of mandamus. It ruled that its own prior decision, *Demasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), "precludes the use of mandamus to reverse the grant or denial of a class certification", 921 F.2d at 1341, 9a, and proclaimed that it was issuing its published opinion in order to emphasize this broad holding. *Id.*

The effect of this ruling is that if a trial court refuses § 1292(b) certification of its treatment of an alleged class action, its decision (no matter how improper or violative of basic rights) is simply not reviewable until a final judgment is entered *after* the trial that petitioners claim will irreparably injure them in violation of their due process and other rights. Indeed, under the trial court's plan to have a jury assess punitive damages before any finding that any defendant is properly in the case, defendants faced with a huge contingent liability for punitive damages may well be unable to obtain appellate review at any stage.[6] But even assuming that relief

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6 At least eight defendants have recently gone into bankruptcy occasioned by asbestos liabilities: Celotex Corp., Carey Canada Inc., Ray-

would ultimately be available, it would only be after the expenditure of many man-years of judicial and legal efforts in adjudicating, prosecuting and defending this mammoth class action.

Quite apart from this manifest injustice, the decision below also creates a conflict with contrary rulings by at least five other Courts of Appeals which have granted mandamus to correct class certification orders. We respectfully submit that it should be reviewed and corrected by this Court before other circuit courts follow suit and arbitrarily close their doors to litigants seeking relief from the arbitrary acts of trial courts.

ARGUMENT

I.

THE DECISION BELOW CREATES A CONFLICT WITH AT LEAST FIVE OTHER CIRCUITS

The statutory basis for the writ of mandamus is found in the All Writs Act, 28 U.S.C. § 1651 (24a), which provides in pertinent part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1651(a). The general principles governing the issuance of mandamus are well established and were recently summarized by this Court:

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mark Industries, Inc., National Gypsum Co., Nicolet, Inc., Eagle-Picher Industries, Inc., H.K. Porter Corp. and Southern Textile Corp. A Phase I punitive damage verdict may well pressure other defendants to settle or file for bankruptcy—in either case foregoing appellate review.

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. . . . Although we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction, we have required that petitioners demonstrate a clear abuse of discretion or conduct amounting to usurpation of [the judicial] power, to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable."

Mallard v. *United States District Court*, 490 U.S. 296, 308-09 (1989) (quotation marks and citations omitted).

The basic question here is not whether these petitioners were entitled to have the writ of mandamus issued (although we submit they clearly were), but whether class certification or decertification orders should be immunized from mandamus review, regardless of the circumstances. This Court has "answered the question as to the availability of mandamus . . . with the refrain: 'What never? Well, *hardly* ever!' " *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam, emphasis in original). The result below rewrites the refrain to read: "What never? *Absolutely* never for class action issues."

In stark contrast, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have all *granted* writs of mandamus vacating district court orders relating to class certification. Indeed, prior to its decision in this case, it appeared that the same rule applied in the Third Circuit. *Lusardi* v. *Lechner*, 855 F.2d 1062 (3rd Cir. 1988), considered a petition for review of a trial court's order decertifying an age discrimination "opt-in" class which the court analogized to a Rule 23 class (*id.* at

1068 n.8 and 1074 n.15). The representative plaintiffs filed both an appeal (which was dismissed) and a mandamus petition, as to which the opinion states:

> "when no other avenue is open, *i.e.*, when a party seeking the writ has no other adequate means to attain the relief he desires and the court below has committed a clear error of law, it may issue."

Id. at 1069 (citing cases). Thereafter, specifically with reference to review of a class determination, the court stated that the writ is not available "*unless* the district court acts 'outside its jurisdiction' or 'in disregard of appropriate procedural safeguards' ". *Lusardi*, 855 F.2d at 1074, quoting *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 at 752 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974) (emphasis added). While denying the writ in other respects, the court issued mandamus to correct the class notice provisions of the decertification order; it further directed the district court to reconsider that order and continued a stay of it meanwhile. *Lusardi*, 855 F.2d at 1080.

Five other circuit courts have not only considered mandamus an appropriate route for review of class certification, but have also granted the writ to correct errors of the trial courts. *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), reviewed by mandamus the certification of a Rule 23 class for settlement purposes and expressly rejected the notion that mandamus was inappropriate.

> "While recognizing that the Supreme Court has admonished the circuit courts to issue writs of mandamus only in the most extraordinary circumstances, we believe that this admonition is only 'a starting point in the effort to develop a specific framework which can assist when practical applications of the generalities is required.' "

Id. at 303, *quoting Bauman* v. *United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977). In the absence of any guidance from this Court providing such a "specific framework", the Sixth Circuit referred to the considerations deline-

ated by the Ninth Circuit in *Bauman*, and issued the writ of mandamus requiring vacation of the certification order.[7] 749 F.2d at 307; *see also In re Allied-Signal, Inc.*, 915 F.2d 190, 193 (6th Cir. 1990) (noting the district court's agreement, at oral argument of the mandamus petition, to vacate its prior class action orders in asbestos personal injury cases and affirming the propriety of using mandamus to correct the trial court's usurpation of power).

Similarly, plaintiffs in asbestos personal injury actions were granted a writ of mandamus vacating class certification in *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), because the court found "clearly erroneous" the district court's findings of commonality and typicality. It explained:

> "Although the record on commonality and typicality of the class is sparse, the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposures. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common."

Id. at 1273 (footnote omitted); *see also In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1542 (11th Cir. 1987).

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7 The five factors, but not prerequisites, were formulated by the *Bauman* court as follows:

> "(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression."

Bauman, 557 F.2d at 654-55 (citations omitted). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." *Id.* at 655.

In re Fibreboard Corp., 893 F.2d 706, 709 (5th Cir. 1990), was another asbestos personal injury mandamus proceeding in which the Fifth Circuit concluded that a proposed class action trial plan was flawed.

Schmidt v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) (per curiam), was an action brought by employees under the Fair Labor Standards Act which the district court permitted to be maintained as a class action under Fed. R. Civ. P. 23. The Eighth Circuit noted that "class actions place an enormous burden of costs and expense upon the parties," and held that mandamus review was available "where the issue presented is one of a clear usurpation of power by the district court". 527 F.2d at 535. It granted mandamus and directed the district court to vacate its orders certifying the class action. *Id.* at 536-37; *see also Sperry Rand Corp.* v. *Larson*, 554 F.2d 868, 872 (8th Cir. 1977); *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 216 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975).

On at least two occasions, the Ninth Circuit has granted a writ of mandamus ordering a district court to vacate a class certification order. *McDonnell Douglas Corp.* v. *United States District Court*, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Green* v. *Occidental Petroleum Corp.*, 541 F.2d 1335, 1338-40 (9th Cir. 1976). In the latter case, the court held that issuance of the writ was within its authority under 28 U.S.C. § 1651, "particularly since we could later entertain appeals on these issues", and continued:

> "We recognize that the issuance of this writ should be limited to exceptional circumstances, and share the Second Circuit's view that orders granting class certification are the proper subject for mandamus in only the most extraordinary circumstances. *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 648 (2nd Cir. 1974). However, we also note the utility of mandamus as a tool to supervise the proper judicial administration in the district courts."

Green, 541 F.2d at 1338-39; *see also Arthur Young & Co.* v. *United States District Court*, 549 F.2d 686, 691-92 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977).

Finally, other decisions of the First, Second and Seventh Circuit Courts of Appeals have recognized that mandamus vacating class certification orders is appropriate when circumstances warrant. *Lamphere* v. *Brown University*, 553 F.2d 714, 718 (1st Cir. 1977) ("[a]n error of this sort might impel us to intervene in mandamus"); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) (mandamus review of class certification order only in the most extraordinary circumstances); *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368-69 & 1368 n.5 (7th Cir.) (mandamus available " 'with respect to the grant or denial of class action status' " in cases of arbitrariness), *cert. denied*, 429 U.S. 907 (1976).[8]

II.

THE RESULT BELOW ARBITRARILY DEPRIVES LITIGANTS OF RELIEF FROM ARBITRARY ACTIONS OF TRIAL COURTS EVEN THOUGH THEY VIOLATE CONSTITUTIONAL RIGHTS

By adopting its rigid rule, the Third Circuit has arbitrarily foreclosed an important, albeit extraordinary, check on the abuse of power by district courts. Although the issue raised by this petition—the refusal of the court below to even consider the merits of the mandamus petition—does not require this Court to determine whether the writ of mandamus should have been issued, the basis for the petition does illustrate the need for the availability of mandamus review.

This Court has established that, because a class certification order is not a "final decision", appellate review is not

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8 *Cf. Gold Strike Stamp Co.* v. *Christensen*, 436 F.2d 791, 792 n.2 (10th Cir. 1970) (declining to address the issue, but stating that "[i]t is entirely conceivable that the facts presented in a particular case may justify the immediate review of an order allowing a case to proceed as a class action").

available under 28 U.S.C. § 1291 (1988).[9] While petitioners had a theoretical possibility of having the trial court certify the issue pursuant to 28 U.S.C. § 1292(b) (1988), that court had stated its intention to proceed to trial within four and a half months, and had acted on other motions for 28 U.S.C. § 1292(b) certification months after they were filed—usually to deny the request.[10] As a practical matter, therefore, there simply was no opportunity for effective appellate review pursuant to § 1292(b) prior to the scheduled trial date. *See* Tr. of Oral Argument, United States Court of Appeals for the Third Circuit, Nos. 90-1217, 90-1219, Sept. 19, 1990, at 166-67 (29a-31a).

Unless reversed, the decision below may well preclude appellate review of the refusal to decertify at any time. The proposed Phase I trial plan, as outlined by Pretrial Order 235, will not result in any appealable order because no claim will have been tried to judgment. *See Manual For Complex Litigation, Second* § 30.17 (1985) (where certifying a class action for trial on special issues, the court should "ensure that the issues certified for class action treatment . . . will, when judgment is entered, support appellate review"). Thus, in the absence of the availability of mandamus, defendants will be compelled to submit to a lengthy trial, raising serious constitutional issues, which may result in ruinous punitive damages being assessed before any finding of liability or compensatory damages. That trial will result in a colossal waste of time and expense (on the part of both the judiciary and the litigants) if appellate review someday establishes that defendants' mandamus application was well founded. But even worse, a substantial punitive damages verdict in Phase I, without any prospect of appellate review until many years in

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9 In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), the Court rejected the argument that class certification orders were appealable under 28 U.S.C. § 1291 and the "death knell" doctrine.

10 On November 2, 1984, defendants moved for § 1292(b) certification of the original order granting class treatment. The District Court did not decide the motion until March 28, 1985—some five months after the request. That is the only instance in which the trial court granted a § 1292(b) motion.

the future, may well put pressure on defendants to settle and give up their rights to ultimate vindication or to seek bankruptcy to avoid this contingent liability. (*See* fn. 6 at p. 9 above).

The trial plan contemplates partial jury verdicts in Phase I without the jury being instructed on the applicable law or the legal consequences of their verdicts, followed by a subsequent trial or trials (perhaps in different jurisdictions) to assess individual issues including liability and compensatory damages. This proposed class action treatment is not only inconsistent with Rule 23 (which, among other things, requires a preponderance of common issues clearly not present here) but violates defendants' rights to due process and to a unitary jury trial on issues which overlap.

The Rule 23 problems are both legal and factual. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-23 (1985), the Rules of Decision Act (codified at 28 U.S.C. § 1652) and *Erie R. R.* v. *Tompkins*, 304 U.S. 64 (1938), as well as the Due Process and Full Faith and Credit Clauses, require district courts in nationwide diversity class actions such as this to apply the laws of each jurisdiction in which the class members' claims arise. Under *Erie*, the District Court must apply the choice of law principles of the forum state, Pennsylvania, to determine which jurisdiction's substantive law governs the action. *Id.*; *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Under Pennsylvania's choice of law principles, as limited by *Shutts*, its courts cannot apply Pennsylvania law unless Pennsylvania has a "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to Pennsylvania." Pretrial Order No. 167, 14a. Here, because class members (other than Pennsylvania schools) have *no* contacts with Pennsylvania, the laws of over fifty jurisdictions in which the class members' buildings are located would have to be applied to supply the substantive rules of decision. The District Court recognized this (Pretrial Order No. 167, 12a-15a) as well as the "individualized" nature of the class members' claims, but found that there were also common issues which

could be resolved without any finding of liability (Order No. 203, 18a-19a).

The combination of the inherently individual nature of these thousands of asbestos-in-buildings claims (*see* p. 5 above) and the *Shutts* requirement, standing alone, refutes plaintiffs' claim of predominantly common issues here. Moreover, although the Phase I jury verdicts would not determine any ultimate issue or any defendant's liability to any claimant, the Phase I issues (*e.g.* punitive damages) are inextricably interwoven with other issues relating to each defendant's individual liability and responsibility for compensatory damages. Under such circumstances, the District Court's proposed trial plan violates defendants' Seventh Amendment rights as elucidated by this Court's opinion in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and its progeny.[11] The essential teaching of those cases is that having different juries pass on the same or inevitably overlapping issues such as liability and punitive damages is constitutionally impermissible because it either leaves the subsequent jury free to vitiate the first jury's findings or binds the subsequent jury to those findings in a prejudicial manner—either of which result involves a deprivation of Seventh Amendment rights.

A writ of mandamus is surely an appropriate remedy for the protection of the constitutional rights to due process and trial by jury. *See e.g.*, *Allegheny International, Inc.* v. *Allegheny Ludlum Steel Corp.*, 920 F.2d 1127, 1134 (3d Cir. 1990). Under the extraordinary circumstances well illustrated by this case, it simply cannot be that litigants faced with impending ruinous deprivations of important constitutional rights can also be deprived of any right to effective appellate review. Yet the ruling below was nothing less than an arbitrary refusal to consider the trial court's arbitrary rulings before they cause irreparable injury. That refusal should be

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11 *See, e.g., Simone* v. *Golden Nugget Hotel and Casino*, 844 F.2d 1031, 1040-41 (3d Cir. 1988); *Vizzini* v. *Ford Motor Co.*, 569 F.2d 754, 760-61 (3d Cir. 1977).

reviewed by this Court now, before it spawns further mischief in this and other cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 1, 1991

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APPENDIX

TABLE OF CONTENTS

APPENDIX

	PAGE
Rule 29.1 Statements	1a
In re School Asbestos Litigation, 921 F.2d 1338 (3d Cir. 1990)	3a
In re Asbestos School Litigation, Pretrial Order No. 167 (U.S. Dist. Ct. E.D. Pa. Jan. 27, 1989)	10a
In re Asbestos School Litigation, Pretrial Order No. 169 (U.S. Dist. Ct. E.D. Pa. Jan. 27, 1989)	16a
In re Asbestos School Litigation, Pretrial Order No. 203 (U.S. Dist. Ct. E.D. Pa. Jan. 12, 1990)	17a
In re Asbestos School Litigation, Pretrial Order No. 235 (U.S. Dist. Ct. E.D. Pa. May 17, 1990)	21a
United States Constitution, Amendment VII	23a
The All Writs Act, 28 U.S.C. § 1651 (1988)	24a
The Rules of Decision Act, 28 U.S.C. § 1652 (1988)	25a
Federal Rule of Civil Procedure 23	26a
Excerpt From Transcript of September 19, 1990 Oral Argument in *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990) (transcript pages 163-68)	29a

Rule 29.1 Statements

Pursuant to Rule 29.1, the Court is advised that:

Armstrong World Industries, Inc. has no parent company and its non-wholly owned subsidiaries are Armstrong-Nylex Pty., Ltd., Armstrong/Pat Davis (China) Limited, Inarco Limited, Armstrong-ABC Company Ltd. and Recubrimientos S.A. de C.V.

Asbestos Corp., Ltd. has no non-wholly owned subsidiary and its majority shareholder is the Societe Nationale D'Amiante, which is not a publicly owned corporation.

Bell Mines, Ltd. has no non-wholly owned subsidiary and its majority shareholder is the Societe Nationale D'Amiante, which is not a publicly owned corporation.

Asten Group, Inc. has no parent company but owns stock of Asten-Hill, Inc., a Canadian Corporation. In addition, a wholly owned subsidiary of Asten Group, Inc. owns stock of COPFA, a French corporation.

Basic, Inc.'s parents and non-wholly owned subsidiaries consist of Combustion Engineering, Inc.

Dana Corporation has no parent company or non-wholly owned subsidiaries.

Empire Ace Insulation has no parent company or non-wholly owned subsidiaries.

Fibreboard Corp. has no parent company or non-wholly owned subsidiaries.

GAF Corporation has no parent company. The only subsidiary of GAF Corporation that is not wholly owned is GAF-Huls Chemie GmbH, a joint venture incorporated in Germany and co-owned by the German corporation Huls A.G.

Georgia-Pacific Corporation's parents and non-wholly owned subsidiaries consist of Great Northern Nekoosa Corp. and Thacker Land Company, Inc.

Uniroyal Holding, Inc. is the successor to Uniroyal, Inc., a dissolved company.

Kaiser Cement Corp.'s ultimate parent company is Hanson PLC. The only non-wholly owned subsidiary is Underwriters Service, Inc.

Pfizer Inc. has no parent corporation; its non-wholly owned subsidiaries consist of Laboratories Pfizer S.A., Pfizer Laboratories (Bangladesh) Ltd., Pfizer Egypt S.A.E., Agricare Limited, Pfizer Limited (India), PT Pfizer Indonesia, Livestock Feeds Limited, Pfizer Products Limited, Pfizer Laboratories Limited, Pfizer Korea Limited, Pfizer Bioquimicos, S.A., Pfizer Limited (Sri Lanka), Pfizer C. & G. Inc., Quigley Italiana S.p.A., SudFarma S.r.l., Pfizer, S.A., Pfizer Pharmaceuticals Ltd., Pfizer Quigley Korea Ltd., Dideco N.V., Sofracob S.A. and Zilc, Inc.

Pittsburgh Corning Corp.'s shareholders are PPG Industries, Inc. and Corning, Inc., each of which are fifty percent shareholders of the company.

Rockwool Manufacturing Co. has no parent company or non-wholly owned subsidiaries.

Wilkin Insulation has no parent company or non-wholly owned subsidiaries.

U.S. Mineral Products Company is a wholly owned subsidiary of Dalen Corporation (formerly Isolatek Corp.) and has no non-wholly owned subsidiaries.

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

Argued Sept. 19, 1990 Decided Dec. 13, 1990

As Amended Jan. 7, 1991

Nos. 90-1217 & 90-1219

IN RE SCHOOL ASBESTOS LITIGATION

The CELOTEX CORPORATION, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard, GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., W.R. Grace & Company, Kaiser Cement Corp., Pfizer, Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons, U.S. Mineral,

Petitioners No. 90-1217,

v.

The Honorable James McGirr KELLY,

Nominal Respondent No. 90-1217,

and

Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools And A Conditionally Certified Class,

Respondents No. 90-1217.

IN RE SCHOOL ASBESTOS LITIGATION

EAGLE-PICHER INDUSTRIES, INC.,

Petitioner No. 90-1219,

v.

The Honorable James McGirr KELLY,

Nominal Respondent No. 90-1219,

and

Barnwell School District No. 45, School District of Lancaster, Manheim Township School District, Lampeter-Strasburg School District, Board of Education of the Memphis City Schools, And A Conditionally Certified Class,

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Before

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Circuit Judges.

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

We are faced with petitions for a writ of mandamus filed by The Celotex Corporation, Carey Canada Inc., Armstrong World Industries, Inc., Asbestos Corp., Ltd., Bell Mines, Ltd., Asten Group, Basic, Inc., Benjamin Foster-Amchem, Union Carbide Corp., Cassiar Resources, Ltd., Brinco Mining, Dana Corporation, Empire Ace Insulation, Fibreboard, GAF Corporation, Georgia-Pacific Corp., Uniroyal, Inc., W.R. Grace & Company, Kaiser Cement Corp., Pfizer, Inc., Pittsburgh Corning Corp., H.K. Porter Corp., Southern Textile Corp., Rockwool Manufacturing Co., Wilkin Insulation, C. Tennant & Sons, and U.S. Mineral at No. 90-1217 and

Eagle-Picher Industries, Inc. at 90-1219 requesting us to order the district court to decertify a nationwide class of school districts seeking to recover damages from manufacturers and distributors of asbestos products. On October 12, 1990, Celotex filed for Chapter 11 bankruptcy in the United States Bankruptcy Court, Middle District of Florida, Tampa Division, at No. 100168B1. The act of filing triggers the automatic stay provisions of 11 U.S.C. § 362. Accordingly, we will stay the proceedings at No. 90-1217 in which Celotex is the petitioner. *See Association of St. Croix Condominium Owners* v. *St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir.1982). We will meet the contentions of the other petitioners at No. 90-1217 and those of Eagle-Picher on the merits and will deny relief.

I.

In 1984, the district court certified a nationwide opt-out class of school districts seeking to recover from approximately fifty defendants. The purpose of certifying the national school asbestos class was primarily to expedite the resolution of the schools' asbestos-in-buildings claims. *In re Asbestos School Litigation*, 104 F.R.D. 422, 433 (E.D.Pa.1984), *aff'd in part, rev'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986). When the case was first before us as an interlocutory appeal, certified under 28 U.S.C. § 1292(b), we reviewed the district court's decision, and substantially agreed with the rationale behind its certification, observing that:

> The use of the class action device appears to offer some hope of reducing the expenditure of time and money needed to resolve the common issues which are of substantial importance. . . . "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases."

Id. at 1010 (citation omitted). Though voicing some concern about manageability of the class, we acceded to the district

court's determination that the litigation would be manageable, both because of that court's greater familiarity with trial management concerns and because class actions are always subject to decertification "[w]hen, and if, the district court is convinced that the litigation cannot be managed . . ." *Id.* at 1011.

In April, 1989, the petitioners, who are two of the fifty defendants in the district court, moved for decertification, arguing, inter alia, that the class was demonstrably unmanageable. The district court denied the motion on January 11, 1990 and this petition for writ of mandamus followed.

In this litigation a question was raised as to jurisdiction. We determined in *In re School Asbestos Litig.*, 921 F.2d 1310 (3d Cir.1990) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, trial court jurisdiction was proper based on 28 U.S.C. § 1332. Jurisdiction before us is premised on 28 U.S.C. § 1651 and Rule 21, F.R.A.P.

II.

On proper appeal from a final judgment, or a certification under 28 U.S.C. § 1292(b), review of the certification of a class is governed by the abuse of discretion standard. *Pa. Dental Ass'n* v. *Medical Services Ass'n of Pa.*, 745 F.2d 248, 255 (3d Cir.1984). But we are not faced with an appeal here. Instead we have a request for mandamus.

Mandamus is a drastic remedy which should be invoked only under extraordinary circumstances amounting to a judicial "usurpation of power," *Will* v. *United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967) or where there is "no other adequate means to obtain the relief . . . and the court below has committed a clear error of law." *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1118 (3d Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987), *quoting Sporck* v. *Peil*, 759 F.2d 312, 314 (3d Cir. 1985), *cert. denied*, 474 U.S. 903, 106 S.Ct. 232,

88 L.Ed.2d 230 (1985). The party seeking mandamus has the burden of showing that its right to the writ is "clear and indisputable." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953).

III.

We do not write on a clean slate here. We considered the precise question sub judice earlier in *DeMasi* v. *Weiss*, 669 F.2d 114 (3d Cir.1982). In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291," 669 F.2d at 119, that the only route open "for the interlocutory review of the grant or denial of class certification, at least in this case, is pursuant to 28 U.S.C § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* There are no circumstances in the matter before us now that were not present in DeMasi.

The *sine qua non* of entitlement to mandamus relief is that the party seeking the writ have no other adequate remedies, *Kerr* v. *United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943); *Commonwealth of Pa.* v. *Newcomer*, 618 F.2d 246, 248 (3d Cir.1980). Petitioner Eagle-Picher clearly has alternative means available under 28 U.S.C. § 1292(b).

We write and publish here only to emphasize that this court adheres to its decision in *DeMasi* and does not intend to dilute our clear holding that precludes the use of mandamus to reverse the grant or denial of a class certification.

IV.

The petition of Celotex for the writ of mandamus at No. 90-1217 will be stayed. The petitions of all other petitioners at No. 90-1217 and Eagle-Picher at No. 90-1219 will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 167

AND NOW, this 27th day of January, 1989, in consideration of defendants' motion for summary judgment regarding the Pre-1978 Virginia School Buildings, plaintiffs' response and defendants' reply thereto, for the reasons set forth in the [annexed] Memorandum, it is ORDERED that defendants' motion for summary judgment is GRANTED and judgment is entered in favor of defendants and solely against those plaintiffs raising claims against defendants arising from the presence of asbestos-containing products in school buildings built in Virginia before January 17, 1978.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-27-89

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 27, 1989

The defendants in this matter have moved for summary judgment pursuant to Fed. R. Civ. P. 56 against class members regarding claims arising from asbestos-containing materials in school buildings built in Virginia before January 17, 1978.

BACKGROUND

Defendants in this action, alleged manufacturers and suppliers of asbestos-containing materials that were used in the school buildings within plaintiffs' school districts, move on the grounds that the Virginia five-year statute of repose for construction defects time-bars the plaintiffs from bringing any claims which relate to the sale or installation of asbestos-containing materials in school buildings built in Virginia before January 17, 1978.[1]

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1 The applicable Virginia statute of repose, Va. Code Ann. § 8.01-250 (1984) provides in relevant part,

> § 8.01-250. Limitation on certain actions for damages arising out of defective or unsafe condition of improvements to real property.—No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such

DISCUSSION

This court must apply the choice of law rules of the forum state, Pennsylvania. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1308 (3d Cir. 1978); *Klein v. Council of Chemical Associations*, 587 F. Supp. 213, 220 n.2 (E.D. Pa. 1984). Pennsylvania choice of law principles combine an "interest analysis" with the "significant contacts" analysis of the Restatement (Second) of Conflicts of Laws (1971). *Melville*, 584 F.2d at 1313 (3d Cir. 1978); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). I refer to the general rule adopted in Pennsylvania for choice-of-law questions. In Pennsylvania, "[I] should apply the law of the predominantly concerned jurisdiction, measuring the depth and breadth of that concern by the relevant contacts each affected jurisdiction had with . . . 'the policies and interests underlying the particular issue before the court.' " *Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (quoting *Suchomajcz v. Hummel Chemical Company*, 524 F.2d 19, 23 (3d Cir. 1975)). But choice-of-law questions involving statutes of limitations is apparently a special area where this general rule may not necessarily apply.

Pennsylvania courts ordinarily apply the Pennsylvania statute of limitations to cases involving disputes over the timely filing of a complaint. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985); *Freeman v. Lawton*, 353 Pa. 613, 46 A.2d 205, 207 (1946).[2] Plaintiffs assert that Pennsylvania courts have been scrupulous in applying the Pennsylva-

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injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

2 A limited exception to this rule is provided by the Pennsylvania borrowing statute, 42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

nia statutes of limitations and cite to *Ross*, 766 F.2d at 827 in support of this proposition.[3] In light of the fact that this case involves not statutes of limitations, but statutes of repose, and there exists overwhelming indicia of contacts of this cause of action and Virginia, I find that the Virginia statute of repose is applicable and bars plaintiffs' claims with respect to those buildings located in Virginia under Pennsylvania's choice-of-law analysis.[4] This finding is further supported by considerations under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1 of the Constitution recognized in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In *Shutts*, a case involving a class action and the constitutionality of applying the substantive law of the forum state Kansas to all claims filed by the plaintiffs, the Court stated:

> . . . the Due Process Clause and the Full Faith and Credit Clause provide[ ] modest restrictions on the application of forum law. These restrictions require[ ] 'that for a State's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts,

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3 Plaintiffs urge the application of Pennsylvania's four year statute of limitations, 42 Pa. Cons. Stat. § 5525 to plaintiffs' contracts claims and Pennsylvania's two year statute of limitations, 42 Pa. Cons. Stat. § 5524, to plaintiffs' tort claims. Plaintiffs argue that Pennsylvania's twelve year statute of repose, 42 Pa. Cons. Stat. § 5536 is inapplicable because section 5536 does not protect manufacturers of building products such as the defendants.

4 *See School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325, 327-28 (Va. 1987) (distinguishing statutes of repose and statutes of limitation). At least in tort law, architects' and builders' statutes of repose typically set the commencement of the period of limitation running not when the injury to the complaining party occurs or is discovered, but upon completion of the construction. In this fashion, statutes of repose as to architects and builders often bar the cause of action before it arises and can be asserted. Annotation, *Validity and Construction, as to Claim Alleging Design Defects of Statute Imposing Time Limitations Upon Action Against Architect or Engineer for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 93 A.L.R. 3d 1242 (1979).

creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.'

Shutts, 472 U.S. at 818 (quoting *Allstate Insurance Co. v. Shutts*, 449 U.S. 302, 312-13 (1981). In *Shutts*, the Court held that application of Kansas contract and Kansas equity law to every claim in the case exceeded constitutional limits given the vast majority of the gas leases and plaintiffs involved in the case had no apparent connection with Kansas other than through the lawsuit. *Id.* at 814-15. In order to ensure that application of Pennsylvania law to this action is not arbitrary or unfair, I must find that there exists a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class to Pennsylvania. *Id.* at 821-22.

It is uncontested that the claims brought by the Virginia class members arise from damage to property (*i.e.*, school buildings) located in Virginia and all the class members asserting claims related to these Virginia school buildings are located in Virginia. In contrast, Pennsylvania contacts to this litigation result only from plaintiffs' choice of forum and the venue of this class action.

Lastly, plaintiffs allege in the complaint and hint in the response to the instant motion for summary judgment that defendants knowingly concealed and misrepresented the hazards posed by friable asbestos-containing products. *See* Complaint at ¶¶ 16, 36, 37. Plaintiffs argue that the Virginia statute of repose should not be applied because of defendants' alleged fraudulent concealment and misrepresentation. Defendants argue that as a matter of Virginia law, fraudulent concealment does not toll the Virginia statute of repose and rely principally on *School Board of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (Va. 1987). However, in *Norfolk*, the Supreme Court of Virginia decided only the question certified and explicitly did not notice the issue raised by plaintiffs with respect to the tolling of Virginia Code section 8.01-250 by defendants' alleged fraudulent concealment. *Id.* at 329. In any event, plaintiffs' response to the instant

motion contains insufficient evidence in support of this allegation.[5]

For the foregoing reasons, defendants' motion for summary judgment is granted.

5 The single piece of evidence plaintiffs provide in support of this position is a series of photocopies of advertisements of asbestos-containing products. These advertisements, without more, do not demonstrate defendants deliberately or otherwise engaged in any act of fraud or misrepresentation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 169

AND NOW, this 27th day of January, 1989, in consideration of certain defendants' motion to extend discovery deadline for eighteen months, and the response thereto by the plaintiffs, the Court enters the following Order:

1. All discovery shall be completed on or before December 31, 1989.

2. Expert witnesses may be deposed between January 1, 1990 and March 1, 1990.

3. The parties shall file a Joint Pretrial Order in accordance with Local Rule of Civil Procedure 21(d)(2) on or before May 1, 1990.

4. The Court shall set a final pretrial conference during the month of May, 1990.

5. This matter shall be placed in the trial pool of June 1, 1990.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-27-89

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER NO. 203

AND NOW, this 12th day of January, 1990, upon consideration of the motion of certain defendants for decertification of the class, plaintiffs' response and defendants' reply thereto, for the reasons set forth in the [annexed] Memorandum, it is ORDERED that defendants' motion is DENIED.

BY THE COURT:

/s/ JAMES MCGIRR KELLY
JAMES MCGIRR KELLY, J.

ENTERED: 1-12-90

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 11, 1990

Presently before the court is the motion of certain defendants for decertification of the class. On September 28, 1984, this court granted the motion of plaintiffs to certify a Fed.R. Civ.P. 23(b)(1)(B) mandatory class, and an opt-out class pursuant to Fed.R.Civ.P. 23(b)(3). The Third Circuit vacated this court's Order certifying the (b)(1)(B) class and affirmed the Order certifying the (b)(3) class. Certain defendants resurrect their attack on the feasibility of maintaining this class action in the instant motion.

DISCUSSION

A class action, once certified under Fed.R.Civ.P. 23(a) and 23(b), should be decertified only when it is clear there exists changed circumstances making continued class action treatment improper. *See Sley v. Jamaica Water and Utilities, Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977). Defendants argue that the existence of many individual issues in this class action such as defendants' alleged knowledge of the health hazards of asbestos and the alleged industry-wide conspiracy to suppress that knowledge render it no longer appropriate for class adjudication. These issues may very well be individualized in nature, but these issues are defenses which do not detract from the commonality of issues present in this case from the perspective of the class members. *See In re School Asbestos*

Litigation, 789 F.2d 996, 1011 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986). Defendants additionally argue that other individual issues such as product identification, comparative negligence and damages would remain in the case. The resolution of substantial common issues need not guarantee a conclusive finding on liability, *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), *cert. denied*, 474 U.S. 946, nor does a need for individual calculations on the issue of damages preclude class determination of those common issues which predominate. *See Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). I cannot conclude that the existence of these individual issues constitutes a sufficient basis upon which to decertify the class.

Defendants argue that this court must presently apply the laws of each relevant state to the claims of the corresponding class members as mandated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Plaintiffs assert that plaintiffs will present factual evidence sufficient to meet even the most stringent state law standards. The requirements of *Shutts* do not pose a problem in light of the "strictest law" proposal of the plaintiffs and the possibility of creating subclasses in order to accommodate any necessary groupings of variances in products liability law among the states. *See In re School Asbestos*, 789 F.2d at 1010 (plaintiffs made a creditable showing that the differences in the applicable state law did not present insuperable problems).

I note that the defendants do not present arguments which are either novel or representative of changed circumstances during the course of this litigation relevant to the requirements of class certification under Fed.R.Civ.P. 23(a). To date, no substantial manageability problems have arisen which would demonstrate to this court that proceeding on a class basis in this matter is imprudent. The common issues which exist in this case are substantial and predominate. Finally, as the Third Circuit noted in this matter, "It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases." *In re School Asbestos Litigation*, 789

F.2d at 1010 (quoting *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986). For the foregoing reasons, I must deny the motion of certain defendants for decertification of the class.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PRETRIAL ORDER NO. 235

AND NOW, this 16th day of May, 1990, in consideration of the motion for order governing conduct of the trial in this matter of the plaintiffs, the various responses of certain defendants, the reply of the plaintiffs and various defendants' sur-replies thereto, it is ORDERED that:

1. The trial of this matter shall be bifurcated. Trial of Phase 1 shall include the following issues:

A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.

B. Defendants' knowledge of the health hazards of asbestos.

C. Defendants' failure to properly warn or test.

D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.

E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.

F. Punitive damages.

G. Common defenses.

2. Determination of the conduct of any additional phase(s) in this action shall be deferred until the completion of Phase 1.

3. The parties shall submit a proposed joint pretrial order in accordance with Local Rule of Civil Procedure 21(d)(2) on or before June 8, 1990. The proposed order shall include proposed factual interrogatories to the jury pursuant to Fed. R. Civ. P. 49(a) and a list by jurisdiction of which interrogatories are applicable to the law of that jurisdiction.

BY THE COURT:

/s/ JAMES McGIRR KELLY
JAMES McGIRR KELLY, J.

ENTERED: 5-17-90

CLERK OF COURT

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The All Writs Act, 28 U.S.C. § 1651 (1988)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ of rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The Rules of Decision Act, 28 U.S.C. § 1652 (1988)

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rule of Civil Procedure 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litiga-

tion concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each sub-

class treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Excerpt From Transcript of September 19, 1990 Oral Argument in *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990) (transcript pages 163-68)

[JUDGE ALDISERT]: Counsel, I'm going to interrupt you. Your argument's going to be divided this morning?

MR. MCINERNEY: Yes, Your Honor.

[JUDGE ALDISERT]: Is someone—is either of you going to discuss the question of jurisdiction of this Court to hear this argument on mandamus. In view of our Court's decision in Demasi and Weiss, saying that this could only come up on 1292(k)(1) [sic].

MR. MCINERNEY: I think that falls to me Your Honor, and I'll address it right now.

[JUDGE ALDISERT]: I'm very concerned about this.

MR. MCINERNEY: Right. In that case I read Your Honor's opinion again only this morning while listening to the argument. You wrote that "The only proper route to review was 1290 (b)—1292 (b), quote, at least in this case, unquote. That's at 669 Fed. 2d 119. Now, we did not read that to mean that mandamus is never appropriate in any case, and this, indeed, is an extraordinary case. We moved to decertify in April of '89, and that was denied on January 12, 1990 in a rather cursory opinion which appears at the first page of the appendix. On January 29, 1990, Judge Kelly denied a 1292 (b) certification on the jurisdictional issue. That's Order 208. At that point and indeed right up until last July—

[JUDGE ALDISERT]: Can I move up one paragraph.

MR. MCINERNEY: Yes, Your Honor.

[JUDGE ALDISERT]: Or the same paragraph before the 12. The first statement "We therefore adhere to the clear and settled precepts of this Court a class action determination of a terminable negative is not a final order appealable under 28 USC 1291." When we said "at least in this case," we were talking about 1292 (b). The point is if it is not 12—if it is not a final order under 1291, how can it come up on mandamus?

MR. MCINERNEY: Your Honor, I thought that the thrust of your opinion was that where there was a practical possibility of a 1292 (b) certification, that—

[JUDGE ALDISERT]: And there, there was a practical application—possibility here. But you people didn't ask for it.

MR. MCINERNEY: My point is, Your Honor—and I was just going to go through the chronology—

[JUDGE ALDISERT]: All right. I want to help you out in your argument here.

MR. MCINERNEY: Thank you.

[JUDGE ALDISERT]: This all comes under the Supreme Court 's unyielding line of cases illustrated by Kir[r] in 1976 is the sine qua non of entitlement to mandamus relief is that the party seeking the writ have no other adequate remedy.

Now, to come before us on mandamus, you have to tell us that you have no adequate remedy, and you have to tell us further that you were precluded by law from applying for an interlocutory appeal under 1292 (b).

MR. MCINERNEY: And I cannot say that we were precluded by law—

[JUDGE ALDISERT]: Of course you can't.

MR. MCINERNEY: —but we were precluded as a practical matter, if I may explain. At the time that Judge Kelly denied our decertification motion and then two weeks later denied any 1292 (b) application on jurisdiction, we were faced with a trial—we were in the trial pool for June of 1990 [for a trial] in which no defendant's liability, and not even any defendant's reason for being before the Court, would be determined because there would no identification of products and so on—and we'll get into that later. But on the other hand, there would be a prejudicial denial of the right to a fair trial in the jury verdicts that would result piecemeal [as distinguished] from what was contemplated under Gasoline Products and this Court's decision in Childers.

Because there was not time for us to file a 1292 (b) certification request and await Judge Kelly's response to that before filing a mandamus petition, at which time I submit to Your Honor, if he had denied it, we would be entitled to file [mandamus] because then there would be no clear—no other adequate remedy, then we felt that we had no alternative but to file this petition last March.

Now, it seems to me that if this were not a class action at all—and I think even if there were a special rule for class actions, which I don't believe—

THE COURT: Do you have any case in the Third Circuit since our case in Demasi where we permitted the issue of certification or decertification to come to us by mandamus?

* * *

Nos. 90-1367, 90-1368, 90-1378

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

W.R. GRACE & CO., et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: March 29, 1991

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW —	
I. THE THIRD CIRCUIT'S REFUSAL TO GRANT MANDAMUS ON THE TRIAL COURT'S DISCRETIONARY RULING DENYING CLASS DECERTIFICATION	5
II. THE NOW MOOTED ISSUE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT WHEN THE DISTRICT COURT USED DISCRETION TO DEFER DISMISSING SOME CLASS MEMBERS	8
III. LONGSTANDING JURISPRUDENCE OF THE APPLICATION OF THE COMPLETE-DIVERSITY RULE IN REPRESENTATIVE ACTIONS	10
IV. THE APPROVAL OF THE LAQ CLASS SETTLEMENT BEING CHALLENGED BY NONSETTLING PETITIONER-CODEFENDANT WITHOUT STANDING	13
CONCLUSION	15
APPENDIX A —Memorandum and Order of the District Court (Dec. 17, 1990)	A-1
APPENDIX B —Excerpt of Brief of Appellee Lac d'Amiante du Quebec, Ltee to the Court of Appeals In Opposition to the Appeal Nos. 90-1247 and 90-1248 of United States Gypsum Company and Kaiser Cement Corporation (July 16, 1990)	A-7
APPENDIX C —Excerpt of Lac d'Amiante du Quebec, Ltee's Memorandum of Law to the District Court in Support of Final Approval of the Settlement between LAQ and the Plaintiff Class (Feb. 9, 1990)	A-10

TABLE OF AUTHORITIES

Cases: Page

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 5, 6, 7

In re Asbestos School Litigation, Master File No. 83-0268, Pretrial Order No. 273 and Memorandum (E.D. Pa. Dec. 17, 1990), 1990 WL 210916 ..... 3, 10

In re Asbestos School Litigation, Master File No. 83-0268, Pretrial Order No. 235 (E.D. Pa. May 17, 1990) 8

In re Asbestos School Litigation, Master File No. 83-0268, Pretrial Order No. 203 (E.D. Pa. Jan. 12, 1990) 2

In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984) 7

Celotex Corp. v. School District of Lancaster, 479 U.S. 852 (1986) 1

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 6, 8

Dayton Independent School District v. U.S. Mineral Products Co., C.A. No. B-87-00507-CA (E.D. Tx. Feb. 14, 1989) 15

DeMasi v. Weiss, 669 F.2d 114 (3d Cir. 1982) 5, 6

In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987) 7

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) ... 7

Finley v. United States, 490 U.S. 545 (1989) 11, 12, 13

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) 7

General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982) 8

Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1973) 14

TABLE OF AUTHORITIES—(*Continued*)

Cases:

	Page
National Gypsum Co. v. School District of Lancaster, 479 U.S. 915 (1986)	1
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	13, 14
In re School Asbestos Litigation, 921 F.2d 1310 (3d Cir. 1990)	2, 3
In re School Asbestos Litigation, 921 F.2d 1330 (3d Cir. 1990)	2
In re School Asbestos Litigation, 921 F.2d 1338 (3d Cir. 1990)	2
In re School Asbestos Litigation, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases)	1, 2, 8
In re Sindram, 111 S.Ct. 396 (1991)	5
Snyder v. Harris, 394 U.S. 332 (1969)	11
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)	12
Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988)	9
Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921)	11, 12
In re Temple, 851 F.2d 1269 (11th Cir. 1988)	7
Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc., 454 U.S. 464 (1982)	13
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)	5, 6
Zahn v. International Paper Co., 414 U.S. 291 (1973)	9, 12

Constitutional Provisions:

U.S. Const. Art. III	13

Statutes and Rules:

28 U.S.C. § 1292(a)(1)	7

TABLE OF AUTHORITIES—*(Continued)*

Statutes and Rules:

	Page
28 U.S.C. § 1292(b)	1, 2, 6, 7
28 U.S.C. § 1332	12, 13
28 U.S.C. § 1332(c)(2)	13
28 U.S.C. § 1367	12
28 U.S.C. § 1367(a)	12
28 U.S.C. § 1367(b)	12
The Judicial Improvements Act of 1990, Pub. L. No. 101-650 Stat. 5089	11, 12
Fed. R. Civ. P. 12(d)	9
Fed. R. Civ. P. 12(h)	9
Fed. R. Civ. P. 12(h)(3)	9
Fed. R. Civ. P. 13	12
Fed. R. Civ. P. 14	12
Fed. R. Civ. P. 19	12
Fed. R. Civ. P. 20	12
Fed. R. Civ. P. 23	12
Fed. R. Civ. P. 23(a)	3
Fed. R. Civ. P. 23(b)(3)	1, 7
Fed. R. Civ. P. 23(c)(1)	7
Fed. R. Civ. P. 24	12
Fed. R. Civ. P. 54(b)	4

Other Authorities:

REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION TO THE CHIEF JUSTICE OF THE UNITED STATES (Mar. 12, 1991)	2
H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990), 1991 U.S. Code Cong. & Ad. News 6860	11, 12
REPORT OF FEDERAL COURTS STUDY COMMITTEE (1990)	11
Lee & Wilkins, *An Analysis Of Supplemental Jurisdiction And Abstention With Recommendations For Legislative Action*, 1990 B.Y.U. L. Rev. 321	12
14 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §§3640, 3641 (Supp. 1991)	13

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities:

	Page
13B C. Wright A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE 2d §3606 (1984)	12-13
C. Wright, FEDERAL COURTS §72 (4th ed. 1983)	10, 14
C. Wright, FEDERAL COURTS §101 (4th ed. 1983)	7
RESTATEMENT SECOND OF JUDGMENTS §42 (1982)	14

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUMMARY OF ARGUMENT

This Brief is a consolidated response to three separate petitions for writs of certiorari (Nos. 90-1367, 90-1368 and 90-1378) to review decisions of the Third Circuit on issues of class certification. This class action is a part of the multitude of litigation arising out of asbestos, an unparalleled situation in American tort law and an unprecedented challenge to traditional methods of judicial administration.

This action was commenced more than eight years ago, seeking to recover for property damage resulting from the use of asbestos in school districts throughout the country. In 1984 the district court certified a class action pursuant to Civil Rule 23(b)(3) and, on an appeal allowed under 28 U.S.C. § 1292(b), that part of the district court's order was affirmed by the Third Circuit in 1986.[1] As Judge Weis wrote then,

> our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

789 F.2d at 1011. This Court denied two separate petitions for writs of certiorari seeking to set aside that decision.[2]

In the five years since then much progress has been made. Discovery has revealed the facts and significantly narrowed the issues. Settlements totaling in excess of $40 million have been reached between the class and six of the defendants. The district court is ready to begin trial this Summer or early Fall, 1991.

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1. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986).

2. *Celotex Corp. v. School District of Lancaster*, 479 U.S. 852 (1986); *National Gypsum Co. v. School District of Lancaster*, 479 U.S. 913 (1986).

Some defendants, having previously tried unsuccessfully to prevent this case from going forward as a class action, have now attempted once more to thwart the efforts of the district court to cope with the unprecedented situation this case presents. The Third Circuit has rebuffed their attempts to use the extraordinary writs of mandamus and prohibition to reargue the propriety of class treatment of this action.[1] Now they come yet again to this Court and ask it to put an end to the fruitful and imaginative efforts of the district court.[4]

W.R. Grace petitioners, **No. 90-1368**, seek certiorari to review both the trial court's discretionary, interlocutory ruling denying their motion for class decertification in this school asbestos property damage class action and the Third Circuit's mandamus denial. These petitioners previously had full interlocutory review under 28 U.S.C. § 1292(b) of the initial class certification ruling.[5] After denial of their subsequent motion for class decertification,[6] petitioners sought a second immediate review of the class status of this action through a writ of mandamus, without ever having requested certification for interlocutory review under § 1292(b). After hearing below, the mandamus petition was dismissed by the court of appeals.[7] W.R. Grace petitioners have offered no reason why this class ruling is special or important for this Court to review by certiorari, nor have they demonstrated any circumstances why they are clearly and indisputably entitled to invoke this extraordinary relief. This petition for certiorari is facially without merit both in fact and in law.

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1. *In re School Asbestos Litigation*, 921 F.2d 1310, 1330, 1338 (3d Cir. 1990), 3 cases; U.S. Gypsum App. at 1a, 15a and Grace App. at 1a, respectively.

4. This case exemplifies the beneficial use of class actions in asbestos litigation as recommended in the REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION TO THE CHIEF JUSTICE OF THE UNITED STATES (Mar. 12, 1991).

5. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986), 2 cases.

6. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 201 (E.D. Pa. Jan. 12, 1990), Grace App. at 17a.

7. *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990), Grace App. at 1a.

U.S. Gypsum petitioners, **No. 90-1378**, seek a writ of certiorari on the grounds (1) that the district court allegedly lacks jurisdiction to hear this class action because when first certified, some of the 35,000 absent members, not now identifiable, did not and might not be able to allege the jurisdictional amount requirement, and (2) that there is an alleged novel issue presented regarding diversity of citizenship jurisdiction in a class action. Petitioners' mandamus writ was denied by the court of appeals.[8]

All prerequisites of class action Civil Rule 23(a) have been satisfied here, including the numerosity test. It never has been disputed that the district court has diversity jurisdiction to hear the claims of the named plaintiffs and of a sufficiently large number of the absent-class-member school districts within its jurisdiction[9] to permit the class action to be maintained. Moreover, as a result of the district court's December 17, 1990 order[10] (four days after the court of appeals' decision) which limited the class, the class now includes "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material"[11] (which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, or which otherwise is easily damaged), and who have damages over $10,000.[12] Defendants have not con-

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8. *In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990); U.S. Gypsum App. at 1a.

9. *I.e.*, those schools who have alleged in the Amended Complaint claims for damages in excess of $10,000 arising from friable asbestos-containing products in their school buildings.

10. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 273 and Memorandum (E.D. Pa. Dec. 17, 1990), 1990 WL 236016 (App. 1a).

11. *In re Asbestos School Litigation*, Master File No. 83-0268, Memorandum accompanying Pretrial Order No. 273 at 1 (E.D. Pa. Dec. 17, 1990); App. A-2.

12. Allegations in the Amended Complaint in force before December 17, 1990 stated that the class consisted of, among others, members whose buildings have or had friable asbestos-containing materials and who incurred damages more than $10,000. U.S. Gypsum App. at 82a, 91a. The Amended Complaint also noted that some small number of members may have damages less than $10,000. *Id.* Therefore, on December 17, 1990, the district court

tested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000. Thus, this part of the jurisdictional allegation was also not a contested issue before the court of appeals.

Moreover, it is undisputed that from the outset, there has been complete diversity of citizenship between all named class representatives and all defendants from each of the three consolidated complaints. There are, concededly, absent class members who are not diverse from defendants. This does not raise, however, a novel issue before the Court. It was decided many years ago by this Court that diversity of the named parties only is sufficient in representative suits, and this recently has been reaffirmed by Congress.

Kaiser Cement, **No. 90-1367**, challenges the Third Circuit's affirmance of the district court's final approval under Rule 54 b) of a partial class settlement with a codefendant. Not only does Kaiser Cement, a nonsettling defendant, lack standing to object to the settlement, but it has not shown any immediate prejudice from the settlement order, and it acknowledges that a term of the settlement was designed to protect nonsettling defendants' contribution and indemnity rights. The only alleged prejudice raised by Kaiser Cement involves a speculative and hypothetical possibility that a class member might challenge the settlement in a future proceeding in a different court. However, if that occurred and if the challenge were successful, the settlement necessarily would be voided as to that class member and consequently nonsettling defendants, including Kaiser Cement, would be free to seek contribution and indemnity in that proceeding by way of a third party complaint against the settling defendant. In any event, jurisdictional amount issues are now moot.

NOTES: *Continued*

effectively eliminated from the class these members with damages less than $10,000.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S REFUSAL TO GRANT MANDAMUS ON THE TRIAL COURT'S DISCRETIONARY RULING DENYING CLASS DECERTIFICATION.

Both of the Questions Presented by the W.R. Grace petitioners go to the decision of the Third Circuit that this was not an appropriate case for mandamus review of the denial of their class decertification motion. But only recently this Court has said once again that "the granting of an extraordinary writ is, in itself, extraordinary. *In re McDonald*, 489 U.S., at 184-185, 109 S.Ct., at 996; see *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976)." *In re Sindram*, 111 S.Ct. 596, 597 (1991). Particular litigation hardships that might be suffered as a result of a discretionary, conditional, interlocutory order are not sufficient grounds for granting mandamus. "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Mandamus will not lie to correct a trial judge's exercise of discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

Contrary to what petitioners contend, the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling. It simply followed the established rule that mandamus hardly ever is appropriate to review such a ruling, reaffirming what it previously held in *DeMasi v. Weiss*, 669 F.2d 114 (3d Cir. 1982). As Judge Aldisert wrote:

> We do not write on a clean slate here. . . . In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291." 669 F.2d at 119, that the only route open "for interlocutory review of the grant or denial of class certification, **at least in this case**, is pursuant to 28 U.S.C. § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* **There are no circumstances in the matter before us now that were not present in *DeMasi*.**

(Grace App. at 9a) (citations omitted; emphasis added).

Petitioners overlook the fact that in the passage Judge Aldisert quoted from *DeMasi*, the court there spoke of "at least in this case" and again said "in this case." After that quotation Judge Aldisert said that there were "no circumstances in the matter before us" to require a different result. Words could hardly make it clearer that the court below was making a sensitive appraisal of particular cases and not, as petitioners would have it, announcing a categorical imperative.

In *DeMasi*, as here, petitioners never sought interlocutory review of the discretionary, conditional class ruling under 28 U.S.C. § 1292(b), which would have been an adequate alternative means for interlocutory review, and petitioners still had and have adequate means to review that ruling after final judgment. Petitioners' suggestion that as a practical matter there was no opportunity for effective interlocutory appellate review is belied by their admission that they were successful at an earlier stage before this same trial court in obtaining a Section 1292(b) certificate and the Third Circuit did review the class certification, affirming in part and reversing in part. (Grace Petition at 4, *citing, In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases)). Having had one full opportunity for interlocutory review, petitioners are now seeking in the eighth year of this litigation to disrupt the district court proceedings for a second time by rearguing the same issues before the Third Circuit.

Under these circumstances, the Third Circuit understandedly denied petitioners' attempt to circumvent well-settled principles governing the use of this extraordinary and drastic mandamus relief. No other circuits are in conflict with these familiar precepts. It is not coincidence that almost all of the purported conflicting cases cited by petitioners were decided in 1974-1977, before this Court clarified the rules about mandamus in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).[14] Nor

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14. In addition, these cases were decided before 1978 when this Court greatly cut back on immediate review of class certification decisions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-470 (1978) (rejecting "death knell"

are any of the more recent cases cited by petitioners in conflict with the decision below, and, in any event, each is manifestly distinguishable from this case, which involves a petition for mandamus review of a trial court's provisional, discretionary order denying decertification in a Rule 23(b)(3) opt-out class action.[14]

Nor are the W.R. Grace petitioners any better off when they assert that it was an abuse of discretion for the Third Circuit not to grant them the writ they sought. The power to issue mandamus exists only when the litigant's right to the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). It cannot be an abuse of discretion not to issue the writ to reverse an order denying class decertification when other adequate alternative means existed and exist for petitioners to obtain the relief they seek. It is conceded that the district court acted within its jurisdiction in denying class decertification. It is conceded that petitioners never sought certification under Section 1292(b) of the order challenged here. It is conceded that petitioners had had full interlocutory review by the Third Circuit of the 1984 class certification order, following which certiorari was denied by this Court.

In addition to all this, review at this stage of the denial of decertification of the class would be wastefully premature. Under Civil Rule 23(c)(1) a class ruling "may be 'altered or amended before the decision on the merits.' Thus, a district

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and "collateral order" theories of review). *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (rejecting appeal under 28 U.S.C. §1292(a)(1)). "If there is to be immediate review of a class certification ruling, it must be by allowance of an interlocutory appeal under 28 U.S.C. §1292(b)." C. Wright, Federal Courts §101 at 704 (4th ed. 1983), citing *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 330 n. 8 (1980).

14. Three of those decisions dealt with certification of a mandatory no opt-out class for damages, two of them in a class settlement context. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (mandatory limited fund class certified without record support, together with an injunction against all pending actions); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987) (mandatory settlement class for damages); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (mandatory settlement class for damages). Also distinguishable is *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (mandamus review of a class trial plan).

court's order denying or granting class status is inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). This fact was explicitly recognized by the Third Circuit in 1986 when it upheld the initial certification of the class. "We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." 789 F.2d at 1011. If the trial court should ever find that this litigation cannot be managed, it has full power to decertify the class. Surely an appellate court should not interfere by extraordinary writ when, as in this case, experience thus far has shown that use of the class action was a wise and productive decision.[15]

II. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE NOW MOOTED ISSUE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT WHEN THE DISTRICT COURT USED DISCRETION TO DEFER DISMISSING SOME CLASS MEMBERS.

The U.S. Gypsum petitioners, in their Question 1, and Kaiser Cement, in its Question I(a), challenge the decision of the district court to defer dismissing from the class those members whose claims do not reach the applicable $10,000 requirement for amount in controversy.[16] Of course it is true

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15. The extensive discussion by the W.R. Grace petitioners (Grace Petition at 6-10, 15-19) of the problems they think will arise from Pretrial Order No. 253, governing trial structure, is also premature, and is not properly before this Court. That Order was entered on May 17, 1990 (Grace Petition at 1-2, 21a). The writ of mandamus that was sought from the Third Circuit was directed to the denial of decertification in Pretrial Order No. 203, entered on January 12, 1990 (Grace App. at 17a). The May 17th order was not before the Third Circuit on the mandamus petition and would not be before this Court if certiorari were to be granted.

16. This issue arose from plaintiffs' amended jurisdictional allegation that "The plaintiff and all members of the class (except a minimal portion thereof),

that every member of the class must satisfy the amount requirement of the statute. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But there are three independent reasons why the action of the trial court is wholly consistent with *Zahn* and why this is not an issue worthy of this Court's attention.

First, the trial court was acting pursuant to the specific authority conferred by Civil Rule 12(d). That rule says that a motion challenging subject-matter jurisdiction is to be heard before trial "unless the court orders that the hearing and determination thereof be deferred until the trial." The district court did exactly what the rule allows it to do. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Mandamus surely cannot issue to challenge a district court's exercise of discretion explicitly given to it by rules promulgated by this Court.[17]

Second, these petitioners forget — or deliberately ignore — that the district court undoubtedly had and has jurisdiction of the action. The question is at most whether certain unnamed members of the class are to be excluded from the class now or at a later time. The lower court is not proceeding "as a court of general, rather than limited, jurisdiction." (U.S. Gypsum Petition at 20). It is going forward to decide a case of which it surely has jurisdiction. At a later time it will determine whether all of the school districts described as members of the class are bound by the judgment. The U.S. Gypsum petitioners say (p. 20) that the ruling below means that "[a] plaintiff need no longer use a key to open the federal courthouse door, because the door is already open; the district court can now *presume* it has the

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have claims in excess of $10,000 . . . . Entities not now identified may exist which own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who cannot allege $10,000 in controversy." Amended Complaint in *School District of Lancaster v. Lake Asbestos of Quebec*, No. 85-0398 (E.D. Pa.), 4 U.S. Gypsum App. at 82a, 91a.

17. The U.S. Gypsum petitioners claim they are entitled to an immediate decision under Civil Rule 12(h)(3), but Rule 12(h) indicates only when particular kinds of objections must be raised to avoid waiver. Rule 12(d) prescribes when motions are to be determined.

authority to resolve claims until proof to the contrary is presented." They are right that "the door is already open", but it is open because there are named plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants. The question is how many school districts can be allowed to go through the open door, and that turns on facts about individual districts that would be burdensome and unnecessary to decide at the present stage.

Third, any issue about amount in controversy is now out of the case. On December 17, 1990, four days after the decisions from the Third Circuit that are now being challenged before this Court, the district court amended the class definition to include "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building materials" and thus "only those school districts that can in good faith assert claims in excess of $10,000." Pretrial Order No. 273 and accompanying Memorandum at 1 (App. A-2). The class has now been limited in just the fashion that petitioners are urging, and their contentions in this regard are moot.

III. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW LONGSTANDING JURISPRUDENCE OF THE APPLICATION OF THE COMPLETE-DIVERSITY RULE IN REPRESENTATIVE ACTIONS.

Kaiser Cement, in its Question 1(b), and the W.R. Grace petitioners, in their Question 2, question whether the statutory requirement of diversity has been properly applied in this case. Indeed it has - but the question in any event would not merit the attention of this Court.

It is literally hornbook law that in a class action based on diversity of citizenship only the named parties need be considered in determining diversity. "It has long been the rule that in a class action only the citizenship of the named representatives is to be considered, and that it is no objection to jurisdiction that other members of the class, not named as parties, are of such citizenship as would defeat diversity." C. Wright, FEDERAL COURTS §72 at 484 (4th ed. 1983). The rule has its origin in the

well-known case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that there can be no aggregation of the claims of class members to meet the statutory requirement of amount in controversy, but it noted with regard to diversity that: "[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant * * *." 394 U.S. at 340.

Petitioners assert that *Finley v. United States*, 490 U.S. 545 (1989), has changed this rule. Their interpretation of Finley is wrong. The fact is that there is not even a dictum, much less a holding, in *Finley* about class actions. It may be for that reason that the petitioners seek to put this into a larger context. The U.S. Gypsum petitioners say that "whether 'limited' diversity is sufficient in class actions has never been resolved by the Court" and that it ought to "address this important issue." (p. 29). Kaiser sees "ambiguity" (p. 25) about that question, but Kaiser paints a poignant picture of Congress caught up in "a 'judicial reform' tug of war" (p. 16) and argues that this case should be used "to provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims." (p. 13; *see also* p. 17).

What all this pretty rhetoric ignores is that Congress has spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer. The purpose of that Act was "to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 734 at 13, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S. Code Cong. & Ad. News, 6860, 6861. That Committee, feeling that "[r]ecent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes," REPORT OF FEDERAL COURTS STUDY COMMITTEE 47-48 (1990), recommended that "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Id.* at 47. As a distinguished member of the Study Committee,

former Solicitor General Rex Lee, said bluntly, this was intended "to overrule the restrictions on supplemental jurisdiction created by *Finley*." Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 333.[18] Congress responded by adopting 28 U.S.C. § 1367, Act of Dec. 1, 1990, Pub. L. 101-650, § 310, 104 Stat. 5089. Under subsection (a) of § 1367, district courts now have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Subsection (b) then limits supplemental jurisdiction with regard to some uses of Rules 14, 19, 20 and 24. Subsection (b) does not limit supplemental jurisdiction over counterclaims and cross-claims under Rule 13, impleader of a third party under Rule 14 (as opposed to the assertion by plaintiff of a claim against a third party who has been brought in under Rule 14), or, most significantly, class actions under Rule 23. The new statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990).

It cannot be doubted that prior to *Finley* it was understood that diversity is required only between the named representatives of the class and the opponents of the class. The House Judiciary Committee's citation of *Ben Hur* and *Zahn* (as Kaiser seems to recognize, p. 16 n.9) makes that clear, if indeed there could have been any doubt. Congress has undoubted power to adopt those rules. The requirement of complete diversity is a statutory requirement, not a constitutional one, and Congress may give the district courts jurisdiction over cases in which there is only minimal diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-531 (1967). The rule for diversity jurisdiction in class actions is a subset of the established rule governing all representative actions. *See generally*, 13B C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND

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18. Indeed U.S. Gypsum recognizes this, even if rather grudgingly (p. 24, n.23).

PROCEDURE 2d § 3606 at 424-25 (1984). The law prior to *Finley* was that only the citizenship of the named parties mattered.[9] The law in all actions commenced on or after December 1, 1990, is that only the citizenship of the named parties matters and that if the court has diversity jurisdiction with regard to them, it can hear claims of other parties that are part of the same case or controversy within the meaning of Article III. Surely this Court has more important things to do than deciding whether to extend *Finley* far beyond its specific holding to exclude from federal court claims by unnamed nondiverse parties in suits brought prior to December 1, 1990, especially when Congress has made it explicit that it wants the courts to hear such claims and it wants to restore the law as it was known before *Finley*.

IV. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE APPROVAL OF THE LAQ CLASS SETTLEMENT BEING CHALLENGED BY NONSETTLING PETITIONER-CODEFENDANT WITHOUT STANDING.

The universal rule is that nonsettling defendants in multiparty actions do not have standing to object to a settlement with a codefendant except in narrow, constrained circumstances, *i.e.*, when defendants can demonstrate some prejudice through "a present or immediate injury in fact." *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Id.*; *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982). Kaiser Cement does

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[9] Shortly before the 1990 Act, Congress similarly validated and did not change the generally-accepted principle that the citizenship of the representative controls in representative suits including class actions brought under the diversity statute. Congress amended 28 U.S.C. § 1332 in 1988 to create a specific exception under § 1332(c)(2) for the representative of an estate or of an infant or incompetent in order to eliminate the device of manufacturing diversity by appointing a representative from another jurisdiction. 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §§ 3640, 3641 Supp. 1991.

not even attempt to assert any present or immediate injury to it from the Lac d'Amiante du Quebec Ltee ("LAQ") settlement, in contrast to the petitioner in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), who had standing because "it would be obviously, and immediately injured if th[e] class-action judgment against it became final without binding the plaintiff class." *Id.* at 805. Phillips Petroleum Co. was the actual defendant in the action so it was vitally interested in how many plaintiffs were suing it directly. Kaiser's potential interest in the LAQ settlement is the protection of its contribution rights. Kaiser Cement acknowledges, however, that the settlement was purportedly designed to protect nonsettling defendants' contribution and indemnity rights, and the Third Circuit so found.

The only prejudice alleged by Kaiser Cement is the speculative and hypothetical possibility that a class member will challenge the settlement in a future proceeding, and as a result, Kaiser Cement's contribution and indemnity rights against LAQ may be diminished. However, it is axiomatic that the future *res judicata* effect of any judgment can only be determined by a later court. C. Wright, FEDERAL COURTS §72 at 483 (4th ed. 1983); RESTATEMENT SECOND OF JUDGMENTS §42 (1982). Moreover, even if such a future challenge were successful due to some defect in the settlement, then LAQ would not be protected by it,[20] and Kaiser Cement would be free to implead any third-party defendant, including LAQ, to test its contribution or indemnity rights in that collateral action.

It is the nature of a class action that frequently you cannot know exactly who is in the class until the claimants come in. Here, settling parties were fully aware of and contemplated at the time of the settlement (before the class definition was amended) the possibility that some class members (those from small school systems without friable asbestos and potentially no claim for punitive damages under state law) might be unable to

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20. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (After finding that publication of notice of securities fraud class action in two newspapers on two separate occasions was fatally insufficient, the court held that "all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to these proceedings will therefore be vacated.").

assert claims in excess of $10,000. All parties accepted that if such absent class members existed outside the court's jurisdiction, they would not be bound by the settlement with LAQ.[21] Thus, LAQ, and not Kaiser Cement, is the only party prejudiced under this scenario, and the only party with standing to complain.

Finally, Kaiser Cement challenges jurisdiction of the certified national class based on local action principles. Kaiser's local action argument is not a proper subject for review on a petition for writ of certiorari seeking review of a partial class settlement and there is no conflict among the courts of appeals. The claims are transitory claims that could have arisen and did arise anywhere, and everywhere. *Dayton Independent School District v. U.S. Mineral Products Co.*, C.A. No. B-87-0050-CA, slip op. at 10 (E.D. Tx. Feb. 14, 1989).

CONCLUSION

The petitions for writ of certiorari should be denied.

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21. LAQ stated in briefing before each of the courts below that it entered the settlement fully aware that it would not bind class members who are ultimately found to be outside of the trial court's jurisdiction, and that such class members could be free to seek individual relief. (App. A-7, A-10).

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Dated: March 29, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

Pretrial Order No. 273

[Filed December 17, 1990]

AND NOW, this 13th day of December, 1990, in consideration of the Plaintiffs' motion to amend the class definition, set forth in Pretrial Order No. 20, and the Defendants' responses thereto, it is ORDERED that the motion is granted and that the class definition is amended as proposed by the Plaintiffs. Only those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material will remain members of the Plaintiff Class.

BY THE COURT:

/s/ James McGirr Kelly

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER

[Filed December 17, 1990]

J. M. KELLY, J. **December 13, 1990**

Plaintiffs have moved this court to amend the class definition in these consolidated diversity actions. By Pretrial Order No. 20 (August 28, 1984) this court certified the Plaintiff Class as being comprised of all owners and operators of elementary and secondary schools in the United States. It appears that after several years of investigation and discovery the Plaintiffs have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain "friable" asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000. Several defendants are in opposition to the proposed amendment of Pretrial Order No. 20, while one defendant, National Gypsum Company, supports the proposed amendment to the class definition. For reasons stated more fully below, this court will grant Plaintiffs' motion to amend the class definition.

Federal Rule of Civil Procedure 23(c)(1) provides, in reference to determinations that a case is maintainable as a class action, that "[a] determination once made can be altered or amended before a decision on the merits if, upon fuller development of the facts, the original determination appears unsound." In the extreme, this section of the rule permits a court to decertify a class and retract its approval of a litigation being brought as a class action. See *Valentino v. United States Postal Service*, 674 F.2d 56, n. 12 (D.C. Cir. 1982).

In more moderate circumstances, however, a court may merely alter or amend the class certification in keeping with its responsibility to reevaluate continually a case's class status as the case progresses. *See, e.g., Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948-9 (9th Cir. 1979). The Second Circuit enunciated a similar responsibility in *Lamphere v. Brown University*, 553 F.2d 714, 720 (2d Cir. 1977), emphasizing "the need for the district court to follow closely the developing evidence as to class-wide decision making and to take seriously its power under Rule 23(c)(1) to alter or amend its certification order before the decision on the merits."

At the time this litigation was initiated, the types and amounts of asbestos products, if any, that were contained in the thousands of school buildings were unknown. The class was properly certified thereafter as inclusive of all elementary and secondary school systems. More than seven years later, the Plaintiffs have not distinctly identified asbestos containment on a building-by-building basis. However, the Complaint has been amended to focus on the presence of *friable* asbestos as the basis for Plaintiffs' claims. Congress has also recently passed legislation specifying that school districts must inspect for any asbestos and initiate maintenance with respect to friable asbestos-containing materials located in their buildings. Asbestos Hazard Emergency Response Act of 1986 ("AHERA").

In light of these developments, the Plaintiffs' proposed amendment to the class definition, narrowing class membership to include only those school districts whose buildings contain friable asbestos products, appears proper. "Friable" asbestos has been defined as material, "which, when dry may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *See, e.g.*, Third Amended Complaint. That it is *friable* asbestos containment for which this class action is seeking relief is consistent with Congress's determination that *friable* asbestos is the type for which school [sic] must implement maintenance plans. Adjusting the class definition correspondingly will streamline this litigation, ensuring that critical issues will be common to all class members.

The defendants who are in opposition to the proposed amendment assert three main arguments. Defendants first claim

that it would be improper for this court to amend the class definition while diversity jurisdiction issues are pending before the Third Circuit. However, the fact that the Third Circuit is currently considering related jurisdictional issues does not prevent this court from properly managing the class. The Plaintiffs have suggested that the class definition be amended in order that only members with claims in excess of the required jurisdictional amount ($10,000) remain in the class. As that is required under *Zahn v. International Paper Co.*, 414 U.S. 291 (1983) [sic], it is not improper to consider the proposed amendment.

Second, the defendants in opposition assert that many class plaintiffs who have relied on the litigation will be unfairly excluded by the amendment without notice. The situations in which notice to absent class members is required under Rule 23 are limited. Notice is required when the court certifies a class under Rule 23(b)(3) because of common issues of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve claims. Fed.R.Civ.P. 23(c)(2). Notice is also required when a class action is to be dismissed or compromised. Fed.R.Civ.P. 23(e). In instances such as here, where an amendment to the class definition has been proposed, notice is not required but discretionary notification is encouraged where the plaintiff has shown that excluded class members: (1) received notice of their original inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion. *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

Plaintiffs' amendment will undoubtedly trim the class by excluding school districts whose buildings do not contain friable asbestos, however, those parties will not be unduly prejudiced as a result. As stated above it is the containment of *friable* asbestos for which Congress has required maintenance plans be implemented, and for which Plaintiffs have amended their Complaint to address. In light of these developments, it is no longer appropriate for any and every school district to remain a class member. It has become clear that *friable* asbestos is the focus of Plaintiffs' claim for relief. Any claims made by school districts not containing friable asbestos in their buildings are distinct and arguably would be prejudiced if forced to remain

and be tried side by side with friable asbestos claims. Notice to excluded class members of the redefinition of the class is not required under these circumstances.

The defendants' third basis for opposition to the proposed amendment centers around the meaning of the term "friable", suggesting that issues of vagueness and timing regarding friable asbestos mandate the rejection of Plaintiffs' proposed class redefinition. However, any questions needing to be resolved regarding the presence of friable asbestos products and the concomitant effects their resolution would have on class membership are no more problematic than those that occur in most class litigation. Although, as defendants state, the class definition must be reasonably specific, by nature the definition of a class and the subsequent determination of its membership require some inquiry and investigation as to the individual class members to ensure the propriety of their inclusion.

In *Crosby v. Social Security Administration of the United States*, 796 F.2d 576 (1st Cir. 1986), cited by the defendants, the class definition was rejected because it necessitated the determination of a subjective issue - what as a "reasonable time" within which a hearing should have been granted - for each individual potential class member. That is not this case. Here, under the proposed amendment, an *objective* determination - the existence of friable asbestos products in school buildings - will be used to determine membership in the class. This is not beyond the bounds of reasonable specificity for purposes of defining the class.

The issue of timing raised by the defendants does not prevent the proposed amendment to the class definition. All of the Plaintiffs' buildings were completely constructed prior to the initiation of this action. Thus the issue for purposes of determining membership in the class is simply whether or not the Plaintiffs' schools were constructed using asbestos materials that are friable, the term friable being defined as "*which, when dry*, may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *supra*, p. 3 (emphasis added). This does not require a determination of *when* each product becomes, or became friable. All that is necessary is for Plaintiffs to identify the school districts that

contain friable asbestos materials. All such school districts shall remain class plaintiffs under the amended class definition.

An appropriate order follows.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 90-1247
NO. 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

School District of Lancaster, et al.,

Plaintiffs

v.

Lake Asbestos of Quebec, Ltd., et al.,

Defendants.

United States Gypsum Company
and
Kaiser Cement Corporation,

Appellants.

Appeal From Final Judgment Of
The United States District Court For The
Eastern District of Pennsylvania.
Master File No. 83-0268

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SUMMARY OF ARGUMENT

After more than six years of litigation, LAQ entered into an agreement to settle this certified nationwide class action for one million dollars. LAQ, a peripheral defendant in asbestos property damage litigation, was fully aware of the then-pending attacks on the District Court's subject matter jurisdiction when it entered into the settlement agreement; indeed, the agreement expressly acknowledged that the settlement would be voided if there were no subject matter jurisdiction.

* * *

Appellants, as part of their overall strategy to derail this litigation, objected to preliminary and final approval of the settlement before the District Court, on the ground that the District Court lacked subject matter jurisdiction to approve the settlement. They appeal here on the same ground, arguing that a partial settlement cannot become final in a diversity class action unless the damage claims of each absent class member are determined first. These objections are an attack on use of the class action device when a court's diversity jurisdiction is invoked, not an attack on the LAQ settlement itself. Appellants' speculation that some few class members exist over whose claims the District Court lacks jurisdiction does not give them standing to challenge final approval of the LAQ settlement. The settlement does not bind class members whose claims are less than $10,000, and it does not purport to do so. LAQ alone bears the risk of any uncertainty that certain claims may not be barred by the settlement. It has accepted the risk, and no one else should be heard to complain on its behalf.

* * *

ARGUMENT

* * *

C. These Appeals Should Be Dismissed Because Appellants' Claim of Legal Prejudice Procedure Is Wrong Both As A Matter of Fact And As A Matter Of Law.

* * *

. . . At this point, only LAQ bears the risk of not knowing the precise scope of the *res judicata* effect it obtained through its settlement, and LAQ has knowingly assumed that risk. The only

purpose served by these present appeals is the disruption of a settlement approval process that should only involve the District Court and the parties to the settlement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: SCHOOL ASBESTOS
LITIGATION

MASTER FILE
NO. 83-0268

THIS DOCUMENT RELATES TO:
ALL ACTIONS

LAC D'AMIANTE DU QUEBEC, LTEE'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE SETTLEMENT BETWEEN LAQ AND THE PLAINTIFF CLASS

THE OBJECTIONS FILED BY NON-SETTLING DEFENDANTS PRESENT NO VALID REASON FOR WITHHOLDING FINAL APPROVAL OF THE SETTLEMENT

Two non-settling defendants have also filed objections to final approval of the settlement. United States Gypsum Company ("USG") and Kaiser Cement Company ("Kaiser") have taken this opportunity to restate their twice-rejected challenge to this Court's subject matter jurisdiction. These defendants have no standing to repeat their jurisdictional arguments in this context.

Defendants assert that they have "a real stake in ensuring that their rights under the judgment reduction provision are recognized and that . . . class members will be bound by this obligation." Kaiser Objection at 2. This concern is unwarranted. The judgment reduction provisions of the settlement agreement are not applicable until a Class member obtains a judgment against a defendant. In order for a Class member to obtain a valid judgment in this action, the Court must have subject matter jurisdiction and the judgment reduction provision will

accordingly, be binding on that Class member. If the Court were to determine that it did not have subject matter jurisdiction over a Class member's claims, that Class member is not bound by the settlement agreement, but neither will any defendant be liable to that Class member in this litigation.* Thus, non-settling defendants lack standing to object to the settlement even on the limited basis they propose.

*Moreover, Class members whose claims were not within the Court's subject matter jurisdiction would not be subject to any judgment reduction as a result of the LAQ settlement because they would not be entitled to participate in the settlement proceeds.

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-1368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1368

W.R. GRACE & CO., et al.,

Petitioners,

—v.—

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,

Respondents,

THE HONORABLE JAMES McGIRR KELLY,

Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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1. Respondents apparently misinterpret this Petition as an attempt to have this Court order the Third Circuit to issue a writ of mandamus (Br. Opp. at 2, 7). Instead, the "question presented" is the correctness of the Third Circuit's ruling "that, as a matter of law, it was powerless to consider" the mandamus petition (Petition at p. i). In other words, the precise issue here raised is much broader and more basic—*i.e.*, can a court of appeals *ever* review by mandamus an order

certifying or decertifying a class action, or are such orders instead insulated from mandamus review? While respondents argue that "the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling" (Br. Opp. at 5), it is quite clear that is precisely what the Third Circuit did. During argument, Judge Aldisert flatly rejected W.R. Grace's counsel's suggestion that *Demasi* v. *Weiss*, 669 F.2d 114 (3d Cir. 1982), permitted mandamus to review a class status ruling in "an extraordinary case" (Petition at 8, 29a-30a). The opinion below states that *Demasi* "*precludes* the use of mandamus to reverse the grant or denial of a class certification" (921 F.2d at 1341, reprinted in Petition at 9a, emphasis added). Indeed, Judge Aldisert wrote that the panel was publishing its opinion for the express purpose of emphasizing this holding. *Id.* These facts, and the fact that the Third Circuit made no attempt to address the issues raised by the mandamus petition (*e.g.*, the radically changed circumstances since the original class certification and the irreparable injury that threatened defendants), demonstrate that the court below held, as it stated, that it could not review by mandamus the class certification order.

2. Respondents attempt to dismiss the many conflicting decisions of other courts of appeals by asserting that these cases are no longer valid precedent after this Court "clarified the rules about mandamus in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980)" (Br. Opp. at 6). But neither decision changed existing law with respect to the availability of mandamus, *Will*, *supra* at 661-62; *Allied Chemical*, *supra* at 34-36, nor were they so understood by later courts of appeals decisions cited in our Petition.[1]

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1 Respondents argue that *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), and *In re Bendectin Products Liability Litigation*, 749

3. Although the basic issue raised here does not require this Court to determine whether the writ of mandamus should have been issued, the circumstances surrounding that application illustrate the need to maintain the availability of mandamus review for appropriate cases. In their response, respondents contend that the trial court's Pretrial Order No. 235 governing the Phase I trial structure was "not before the Third Circuit on the mandamus petition" (Br. Opp. at 8 n.15). Even assuming *arguendo* that this Court would ignore important rulings of the trial court subsequent to the Third Circuit's decision,[2] respondents' argument is simply mistaken as a matter of fact. Pretrial Order No. 235 was subsequent to the filing of the original mandamus petition but it was added to the record in the reply submission to demonstrate the trial court's ongoing inability to deal with the requirements of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Order No. 235 was in fact quoted extensively in the dissenting opinion of Judge Cowen in *In re School Asbestos Litigation*, 921 F.2d 1310, 1321 (3d Cir. 1990), the companion decision on subject matter jurisdiction filed the same day as the decision refusing to consider the mandamus petition here.

4. While the trial court is on the verge of commencing a monumental class action trial that threatens violation of defendants' constitutional rights, the respondents argue that review of the class certification would be "wastefully prema-

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F.2d 300 (6th Cir. 1984), are "manifestly distinguishable" because they involved review of certifications of mandatory classes for damages whereas this case involves an opt-out class action (Br. Opp. at 7 & n.14), but offer no explanation as to why The All Writs Act, 28 U.S.C. § 1651, should apply differently to these two types of class actions. With respect to *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), respondents simply state that the case is "[a]lso distinguishable" without explaining how (Br. Opp. at 7 n.14).

2 Respondents' argument is particularly anomolous insofar as their opposition to the diversity jurisdictional amount arguments raised by the petitioners in Nos. 90-1367 and 90-1378 rests largely on the significance they attribute to an order issued by the trial court after the decisions of the Third Circuit (Br. Opp. at 10, A-2).

ture" (Br. Opp. at 7). This argument borders on the cynical when contrasted with the Petition's demonstration that the Third Circuit's decision may well foreclose any appellate review at any stage (Petition at 9, 16-17). Accordingly, this may be the Court's only opportunity to review this important issue. If it does not, future petitions for mandamus with respect to class certification orders will not be brought, or if brought will not be considered, at least in the Third Circuit.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the writ of certiorari should issue.

Dated: New York, New York
April 10, 1991

Respectfully submitted,

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